Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1563

PPX ENTERPRISES, INC.,

Petitioner,

—against—

SCEPTER RECORDS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Scepter Records, Inc. (hereinafter "Scepter"), respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari of PPX Enterprises, Inc. (hereinafter "PPX").

OPINION BELOW

The opinion delivered in the New York Court of Appeals is not as yet officially reported, but appears at page 5a* of the appendix portion of the Petition for a Writ of Certiorari.

JURISDICTION

The Petition for a Writ of Certiorari was filed on or about May 1, 1978. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3).

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* The Petition for a Writ of Certiorari erroneously refers to this opinion as appearing at page 1a of the Appendix portion of the Petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether it is a denial of any due process requirement for an ex parte, attaching creditor to be required to substantiate the amount of the attachment pursuant to an order properly made under state law, in a five-day hearing at which the attaching creditor is afforded a full opportunity to examine the debtor's books and records, to cross-examine the witnesses of the debtor and to call his own witnesses and, at the conclusion of which, the hearing officer determines that the amount of the attached funds is excessive.

RESTATEMENT OF THE CASE

Preliminary Statement

The Petitioner herein has failed

entirely to demonstrate that the "special and important reasons", pursuant to the requirements of Supreme Court Rule 19(1)(a) exist for the issuance of a Writ of Certiorari.

Petitioner fails to demonstrate how the decision of the New York Court of Apeals is inconsistent with the applicable decisions of this Court. On both the facts and the law, as will be discussed below, the decision below was in accord with well-settled law of this Court and of New York.

Petitioner's claim, that it was denied due process because it did not have the opportunity to conduct discovery proceedings prior to being required to respond to a challenge to the excessiveness of its attachment, is not based upon an adverse

decision of the New York Court of Appeals, because that decision expressly refused to consider the question based upon the Petitioner's failure, throughout lengthy prior proceedings, even to raise the issue. See Pet., at 6a. Indeed, the New York Court of Appeals found that Petitioner failed to raise an objection at the time of the reference from Special Term, before the Special Referee, at Special Term at the time the Special Referee's report was acted upon or at the Appellate Division.

The Proceedings Below

In April 1974, Scepter gave written notification to PPX of the termination of their license and royalty agreement. Thereafter a dispute arose between Scepter

and PPX concerning the status of the account between them. PPX, on September 4, 1974, obtained an ex parte order of attachment in the amount of $30,000 plus costs, interest and sheriff's expenses. As grounds for obtaining the attachment PPX alleged that Scepter had been guilty of a "conversion" of trust property belonging to PPX thereby permitting an attachment under the provisions of former CPLR 6201(8), which has since been repealed by the New York legislature. Conversion is no longer a ground for an attachment under New York Law. In its application for the attachment, PPX relied upon Paragraph 7 of the July 16, 1971 agreement which in relevant portion states:

> "...All monies received shall be considered owned 25% by PPX

> Enterprises Inc., and 75% by Scepter, even though the checks are made payable to Scepter. Such monies shall be held in trust by Scepter and paid within three (3) days after clearance of checks received by Scepter from various licensees."

Thereafter the sheriff attached Scepter's funds in an amount sufficient to comply with the order of attachment. Scepter obtained an order to show cause why the order of attachment should not be vacated on September 4, 1974. The motion was denied, as was a motion for reargument. The Appellate Division of the New York Supreme Court, First Judicial Department affirmed the orders below. 48 App.Div.2d 1017, 372 N.Y.S.2d 182.

On April 1, 1975, PPX obtained another, ex parte "supplemental" order of

attachment in the amount of $56,000 plus interest, costs and sheriff fees and the sheriff levied upon additional funds of Scepter in an amount sufficient to satisfy this attachment. The total amount of Scepter's funds then under attachment was $114,680.00.

Scepter made a motion to vacate or modify as excessive PPX's supplemental order of attachment. In his decision of May 14, 1975, the Hon. Thomas J. Hughes, J.S.C., denied Scepter's motion to vacate the supplemental order of attachment and referred the issue raised by Scepter's claim of excessiveness of the supplemental order of attachment to a Special Referee to hear and report with recommendations. In accordance with Justice Hughes' order,

the Special Referee conducted hearings on June 24, August 5, August 6, September 3 and October 14, 1975.

In a report dated December 24, 1975, the Special Referee found that the total amount subject to attachment as of March 31, 1975, the day before the issuance of the second order of attachment, was $17,638.00. Also the Special Referee recommended that the supplemental order of attachment be vacated as excessive. Scepter's motion that the report of the Special Referee be confirmed, that the supplemental order of attachment be vacated and that the initial order of attachment be reduced to the amount of $17,638.00 was granted by the court below. An order of that court was entered on or about March 30, 1976.

PPX appealed that order to the Appellate Division, First Department which unanimously modified the order by striking that portion of the "fourth ordering paragraph" which modified and reduced the first order of attachment made on September 4, 1974 to $17,638 and by reinstating it to the full amount of $30,000. As so modified the order of the Supreme Court was otherwise affirmed, i.e., the vacatur of the supplemental attachment was affirmed. 53 App. Div.2d 838, 385 N.Y.S. 2d 561.

Thereafter, PPX's motion to the Appellate Division, First Department for leave to appeal to the New York Court of Appeals was granted. The order granting leave to appeal was entered on September 23,

1976. The question certified for appeal by the Appellate Division was: "Was the order of this Court, which modified the order of the Supreme Court, properly made?"

The New York Court of Appeals, by a vote of 5-2, answered the certified question in the affirmative in its decision of March 21, 1978. Thereafter, on or about May 1, 1978, PPX filed the instant Petition for Writ of Certiorari to the New York Court of Appeals.

The Facts

(a) The Parties

Scepter heretofore engaged in the business of manufacturing phonograph records and tapes recorded by artists and performers

under contract to it. PPX represents phonograph record manufacturers in the negotiation of licensing agreements with other phonograph record manufacturers in permitting the use of master recordings owned and controlled by the companies it represents.

(b) The Agreement Between the Parties

Prior to July 1971, PPX and Scepter engaged in negotiations concerning the representation of Scepter by PPX in the licensing of Scepter's master recordings to foreign companies located outside the United States and Canada, the consequence of which was an agreement between them dated July 16, 1971. Under

the agreement, PPX acted as Scepter's representative for the licensing of phonograph record master recordings owned or controlled by Scepter and its subsidiaries to foreign manufacturers located in all countries except the United States and Canada.

PPX was to earn 25% of gross monies and royalties for the term of the contract minus royalties due to the artists. Expenses incurred by PPX were to be deducted from gross receipts on a basis of 75% to be paid by Scepter, and 25% to be paid by PPX.

At the same time, PPX was allowed to conduct its own business from which the above described venture was considered separate and independent.

All monies received were considered owned 25% by PPX and 75% by Scepter, even though the checks were made payable to Scepter. Monies received by Scepter were held in trust by Scepter and were to be paid within three (3) days after clearance of checks received by Scepter from the various licensees.

In September, 1971, PPX and Scepter entered into a second, superceding agreement. This agreement described essentially the same relationship between PPX and Scepter, however the trust language was omitted from it.

The sole commission to PPX under the superceding agreement was twenty five (25%) percent of all gross monies received

during the term of any contracts negotiated thereunder after deduction of artist and/or producer royalties actually due and payable. Scepter had the right to retain a proportionate amount in reserve for artists' and producers' royalties. PPX was not entitled to compensation on presently existing contracts, except to the royalties due to Scepter and unpaid were recovered. PPX was to receive, as its fee, 25% of the remainder after the deduction of audit fees and producers' and artists' royalties.

Under the agreement, commissions earned were to be paid by Scepter within three (3) business days after clearance of check received by Scepter from the various licensees. All monies payable by

licensees were directed to Scepter in each instance.

(c) The Amounts Fixed in the Orders of Attachment.

The amounts fixed in the orders of attachment of September 4, 1974, and April 1, 1975 were based upon unilateral assertions made by PPX in its moving papers. The "documentary evidence" submitted by PPX in support of its motions consisted of hearsay and of copies of PPX's own invoices sent to Scepter. Since PPX had never examined the books of account of Scepter, it did not have actual knowledge of what sums Scepter had received and based its calculations mainly upon sums which it presumed "upon information and belief, [Scepter] has received, in accordance with the terms of . . . license

agreements . . . from licensees." In fact, in PPX's complaint, it is conceded that PPX was "without knowledge of the exact amounts of money received by defendant under license agreements negotiated by plaintiff on behalf of defendant, except insofar as hereinbefore alleged." No specific sums of money are "hereinbefore alleged" in the complaint.

PPX also included within its attachment papers requests for sums for "expenses" allegedly incurred and for "collections" allegedly made on behalf of Scepter. The hearings before the Special Referee constituted the first opportunity Scepter had to demonstrate the exaggerated and baseless nature of many of PPX's claims.

The issue referred to the Special Referee for determination was whether the amount attached pursuant to the supplemental order of attachment of April 1, 1975 was excessive. The hearings consumed five days of testimony over a five month period from June until October. The transcript consists of 822 pages. Some 43 exhibits were introduced into evidence. Each of the parties was afforded an opportunity to examine the relevant books and records of the other and to present proof in support of their respective positions. Only after an exhaustive and comprehensive hearing on all areas of financial controversy between the parties, did the Referee render his report.

In preparation for the hearing, Scepter retained the national accounting

firm of Coopers & Lybrand to examine the books and records of Scepter and PPX to ascertain the status of the financial account between the parties as of the date of the supplemental order of attachment. The witnesses associated with Coopers & Lybrand who testified at the hearing were Seymour Jones, a partner of the firm and a certified public accountant for some 15 years, and Thomas Hyland, a certified public accountant and employee of Coopers & Lybrand, who assisted in the examination of records. Mr. Jones testified that Coopers & Lybrand had been asked by Scepter to conduct a special purpose review to determine the status of the account between Scepter and PPX. In connection with this financial review, Coopers & Lybrand examined all relevant

records: contracts between Scepter and its artists, contracts between Scepter and foreign licensees, royalty statements received from foreign licensees, cash receipts books, general ledger and supporting data. Based upon its examination, Coopers & Lybrand prepared a schedule which reflected its finding as to the status of the account between the parties as of March 31, 1975. The schedule was introduced into evidence as Exhibit "A" and consisted of two pages called Schedule "A" and Schedule "B". Schedule "A" showed the total receipts by Scepter from foreign licensees whose contracts had been negotiated by PPX, the artists' and producers' share of earned royalties paid out of such receipts by Scepter, the payments previously made either by Scepter to PPX

or by the foreign licensees directly to PPX and the maximum amount due to PXX from Scepter.

It was the finding of Coopers & Lybrand, as reflected in its "Exhibit A," that the maximum amount subject to attachment as of April 1, 1975, was $17,638.00. The Exhibit reflected how this conclusion was reached and was itemized to demonstrate its accuracy.

Mr. Jones and his assistant, Mr. Hyland, were cross-examined at great length by PPX's attorneys. Their direct testimony and the complete accuracy of the schedule prepared by them were in no way successfully challenged or discredited. PPX's attorneys engaged in argumentation with the accountants over the theory of PPX's claim and its

interpretation of the agreement. Some twenty-seven pages of cross-examination of Scepter's accountants consisted of argument regarding the reconciliation of the language of agreements between Scepter and foreign licensees with the provisions of the agreements between Scepter and PPX. Following such fruitless and time-wasting inquiry, PPX's counsel spent the next eighty-four pages of hearing testimony, recorded over a period of two days, attempting, without success, to show that the deduction made by the accountants for earned artists' royalties was not warranted. At the end of the exhaustive cross-examination by PPX's counsel, the testimony of Mr. Jones and Mr. Hyland remained firm and unshaken.

PPX's proof consisted of the testimony of Edward Chalpin, the president

and sole stockholder of PPX, and Leo Strauss, an accountant with the accounting firm of Prager & Fenton, which had been retained by PPX in connection with the hearings. At the outset of his direct testimony, Mr. Chalpin was asked to provide his own interpretation of the two agreements between Scepter and PPX and was asked to describe "the intentions" of PPX and Scepter in respect to the contractual provisions regarding the deduction of artists' royalties. Objections to such testimony were sustained.

Mr. Chalpin then claimed that there were additional contracts he had negotiated with foreign licensees on behalf of Scepter for which PPX had not been credited. It soon developed that

with respect to one such licensee, Top Tape, a single payment of $20,000 had been made and that PPX had received its full $5,000 out of the proceeds of such payment. Mr. Chalpin was not a man to give up easily, however. He persisted in his contention that there were other monies received by Scepter from this licensee. When asked if he actually knew how much was received, he said "I have no idea." Mr. Chalpin continued undeterred. He testified that he had negotiated a contract with another foreign licensee, Record Distributors Limited, for which PPX had not been credited. He was unable to produce an executed agreement but presented a form of proposed agreement. What soon developed was that, in fact, Mr. Chalpin unilaterally had terminated the negotia-

tions with Record Distributors and had returned an advance payment of $3,000 to the company, together with a letter acknowledging the licensee's "wish to cancel the deal." It was clear that PPX was not entitled to any additional compensation with respect to this licensee either.

Although he stated that certain expenses and payments had been omitted from the schedules, after cross-examination and the introduction of other evidence, the Special Referee made his own findings issued in a ten page decision. These findings became the basis of the court's decision to modify the attachment and in large part the Appellate Division and Court of Appeals affirmed the lower court's holding.

As is obvious from these facts, petitioner had an ample hearing of its claim.

ARGUMENT

This case presents no new or significant issues not already firmly settled. This court has clearly held, on numerous occasions, that due process requires notice and a hearing. The petitioner has not demonstrated any denial of either requirement. Indeed, the Petitioner was afforded a lengthy hearing, with all conceivable rights to call witnesses, cross-examine witnesses for the opposition, and discover and inspect evidence. Moreover, the decision of the New York Court of Appeals from which petitioner seeks to appeal was not made,

by its own terms, on the issue petitioner now seeks to raise, i.e. that it was not allowed to conduct pretrial discovery prior to a hearing on the excessiveness of the attachment. Rather, the court below specifically rejected the argument because petitioner at four prior stages of this proceeding had never raised an objection to the alleged denial of due process and, thus, because the issue was not presented to the New York Court of Appeals.

I.

THE PETITIONER HAS NOT BEEN DEPRIVED OF DUE PROCESS

As this Court has held on numerous occasions, the requirements of due process are satisfied when a party has notice and an opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); and Boddie v. Connecticut, 401 U.S. 371 (1971). Indeed, the petitioner herein does not appear to question that it received the due process (i.e., notice and a hearing) this Court has customarily required. Rather, the petitioner seeks to establish its right to a certain "degree" of due process. Specifically, the petitioner asserts that

it should have been accorded an opportunity to conduct full-scale pretrial discovery, prior to the hearing held herein to establish the proper amount of petitioner's attachment of Scepter's monies. As petitioner concedes, nowhere has such a requirement heretofore been imposed by any court or under any statute.

The statutory framework in question, Article 62 of the Civil Practice Law and Rules of New York, provides that the attachment debtor may make a motion to vacate or modify an attachment. See CPLR 6223 (which is set out in the Petition at 3). In this case, Scepter made such a motion and it was granted to the extent that the lower New York court on May 14, 1975, referred to a Special Referee the

question of whether the amount actually attached by the petitioner was excessive.

The Special Referee did not give short shrift to this question as petitioner would lead this court to believe. Indeed, five days of hearings were held on June 24, August 5 and 6, September 3 and October 14, 1975, 822 pages of testimony taken, 43 exhibits introduced into evidence, and witnesses were heard. The petitioner had more than a full month to prepare the hearings. After the first day of the hearings, the four subsequent hearing days were spaced over a four month period which gave the petitioner an even greater opportunity to prepare and to examine the exhibits after each succeeding hearing day. The Petitioner also had access to all of the exhibits of Scepter - including

the exhibits gleaned from the financial books and records of the company. It would be hard to imagine that discovery in a different form would or could have been more complete than what petitioner had. It is clear that based upon these undisputed facts that no deprivation of due process could exist here even if the legal theory now proposed by petitioner were ultimately held by this Court to have validity.

Since the facts of the instant case are inapposite to the legal theory of which petitioner seeks review and since the legal question involved has been carefully considered on numerous prior occasions and is well-settled, this Court should not issue a Writ of Certiorari herein.

II.

THE COURT BELOW DID NOT REACH THE ISSUE RAISED BY PETITIONER FOR THE FIRST TIME HEREIN

Prior to its appeal to the New York Court of Appeals and at the four prior stages of the instant proceeding, the petitioner did not raise its present claim that the procedure followed by the lower court constituted a denial of due process. Thus, petitioner failed to demand "pretrial discovery" prior to the hearing herein either before Special Term at the time of the reference or or at the time of Special Term's acceptance of the Special Referee's report and the issuance of an order thereon. Further, petitioner failed to raise the issue either before

the Special Referee or in its appeal to the Appellate Division of the New York Supreme Court.

Even in its appeal to the New York Court of Appeals, the petitioner alluded to the issue only tangentially. The Court stated:

> On the appeal to us, plaintiff does not challenge the details, analysis or computation of the accounting reported by the referee. Rather plaintiff asserts that the reference should have been limited to inquiry and report as to the "good faith" of plaintiff's claim and that it was therefore error on the part of the referee to give a nonbinding advisory opinion on the merits of the controversy without opportunity for pretrial discovery and production of witnesses.

> The record fails to disclose any objection by plaintiff to the generality of the reference to the referee, any application to the court or to the referee to make the terms of the reference more specific, or any attempt prior to receipt of the report of the referee to limit the scope of the reference as it is now contended should have been done. In these circumstances we conclude that the contention of error, if any, presently advanced has not been preserved for appellate review. (emphasis added).

Pet., at 6a. Petitioner should not be allowed to raise here an issue which has not been adjudicated fully below.

CONCLUSION

For the foregoing reasons, Respondents respectfuly submit that the petition for a Writ of Certiorari should be denied in all respects.

Dated: New York, New York
June 5, 1978

Respectfully submitted,

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